BOOK REVIEWS

RESCISSION OF CONTRACTS: A TREATISE ON THE PRINCIPLES GOVERNING THE RESCISSION, DISCHARGE, AVOIDANCE, AND DISSOLUTION OF CONTRACTS. By Charles Bruce Morison, one of His Majesty's Counsel in New Zealand. London: Stevens and Haynes. 1916.

This book is not a collection of cases on rescission, but a discussion of the fundamental principles of the subject. It is "designed more as a tool for the worker than as a supply of material." The author has remarked the surprise of the plain business man that the lawyers of the world's greatest commercial communities are in continual disagreement on such everyday questions, as, for example, the right of a buyer under a contract for delivery by instalments to call off the whole transaction when the first instalment arrives short.[1] Consequently he tries to spell out of the leading cases a definite and satisfactory set of principles to guide the practising lawyer in advising on breaches of contract. Such an attitude is refreshing, and more American textbooks ought to be written in the same spirit rather than as mere digests of decisions.

If the author's purpose were successfully carried out, this would be a valuable book. Unfortunately the statement of his views is much less clear than in his two articles in the Law Quarterly Review,[2] of which the book is an expansion. We never quite discover how that instalment question should be decided. And although the book professes to cover the whole field of the termination of unperformed contractual obligations by acts of the parties, such important topics as avoidance for mutual mistake receive very meagre treatment.[3] The book must be judged by its discussion of one problem, how far the default of one party to a contract excuses the other from further performance.

In many respects his suggestions are sound and fruitful, as when he points out that this situation should be sharply distinguished from true "rescission," which requires the consent of both parties;[4] or vigorously attacks the persistent English notion that no matter how serious A.'s default, B. must go on performing unless A. shows an intention to repudiate the contract;[5] or demonstrates that a court in which law and equity are fused should apply the same test in determining if A.'s default bars relief, whether A. seeks damages or specific performance subject to compensation.[6]

What, then, is the true test, whether A.'s default excuses B.? The first theory, historically, was that the promises were independent and B. was never excused. If A. promised a cow and B. promised money, A. could keep the cow and get the money and B. would have only a cross-action for the cow. In later cases B. was excused if by construction of the contract A.'s performance could be regarded as an implied condition of B.'s promise. This doctrine Mr. Morison of course rejects. The question is not of conditions and precedence in time, but of failure of consideration.[7]

For Mr. Morison "consideration" means the consideration which makes B.'s promise binding, *i.e.*, the inducement which led B. to enter the contract. Consequently, he determines whether B. is excused by A.'s breach of promise by considering the situation at the time of the contract, — was that particular promise so important a part of the contract as to have been the inducement to

[1] Contrast Hoare *v.* Rennie, 5 H. & N. 19 with Simpson *v.* Crippin, L. R. 8 Q. B. 14.
[2] "The Rescission of Executory Contracts for Partial Failure in Performance," 28 L. Q. R. 398, 29 L. Q. R. 61.
[3] Pages 154–159.
[4] Pages 5, 19.
[5] Pages 38, 39.
[6] Pages xxix, 71, and note.
[7] Page 55.

B.? If so, a breach of that promise excuses B. It makes no difference how seriously A. failed, why he failed, whether he is likely to perform a little later, etc. The intention of the parties in contracting cannot be learned from matters *ex post facto*.[8] Therefore the nature of the breach is irrelevant.

Here issue must be taken. The situation at the time of the breach is much more decisive of B.'s action as a business man than the past events surrounding the contract. This is not a problem of construction of the contract, but of an equitable defense for B. under the whole circumstances of the case. For example, A., a prima donna, agreed to sing through the season for B., an impresario. She sends word she will not appear the first night. Can B. cancel the contract? For Mr. Morison the result will be the same whether she is ill or sulky or off on a spree; whether she has been faithful or irresponsible in the past; whether a temporary substitute can be easily obtained or a permanent diva must be engaged. Such facts are immaterial for the construction of the original contract, but should justly actuate B.[9] The language of the courts is undoubtedly confused, because they try to combine the succession of inconsistent doctrines which have been in force; but most of the results actually attained by the decisions harmonize with this view that the right to cease performance depends on the materiality of the breach, and not on the intention of the parties when contracting.

Mr. Morison's doctrine that failure of "consideration" means common-law consideration leads him to a still more indefensible position, that if B.'s promise were binding without consideration A.'s default would never excuse B. (unless a condition could be implied). He therefore states that the doctrine of failure of consideration does not exist in the Civil Law [10] or in covenants,[11] and would hardly exist at all if Lord Mansfield had succeeded in making written promises as binding as if under seal.[12] Yet, even when a counter-promise is unnecessary it may exist, and if so, all the problems as to exchange of performances would arise in French or German business as much as in Anglo-Saxon communities. In fact, the doctrine of excuse by breach does prevail on the Continent of Europe; [13] and in the United States it extends to sealed contracts as well as unsealed.[14]

It is to be hoped that Mr. Morrison will at some future time work out his theories in connection with the American cases, which have developed less rigidly than the English. At the same time it would be helpful if he would illustrate his propositions by concrete examples, so that the justice of the result might be easier to determine.

One more question this book raises. Very light to handle, cloth-bound, resembling a history rather than the legal treatise in ponderous buckram, it suggests that there is no reason why law should be written as a thing apart from the general field of serious writing. The prospect of more monographs on legal topics for intelligent men of all classes, such as Odgers' "Libel and Slander," would be indeed alluring.

ZECHARIAH CHAFEE, JR.

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[8] Pages 58, 86 *ff.*

[9] Poussard *v.* Spiers, 1 Q. B. D. 410; Bettini *v.* Gye, 1 Q. B. D. 183; decisions which Mr. Morison calls a *reductio ad absurdum*.

[10] Pages 12, 85.

[11] Pages 63, 66, 69.

[12] Page 60, note.

[13] "Dependency of Mutual Promises in the Civil Law," Samuel Williston, 13 HARV. L. REV. 80; French Civil Code, § 1184; German Civil Code, § 325 *ff.*

[14] Ballou *v.* Billings, 136 Mass. 307; and see Ellen *v.* Topp, 6 Ex. 424.